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No. 07-1327

IN THE

# Supreme Court of the United States

ALBERTSON'S, INC., *et al.*,
*Petitioners,*

v.

JENNIFER KANTER, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of California**

## BRIEF AMICI CURIAE OF THE FOOD MARKETING INSTITUTE, THE GROCERY MANUFACTURERS ASSOCIATION, THE INTERNATIONAL DAIRY FOODS ASSOCIATION, AND THE AMERICAN FROZEN FOOD INSTITUTE IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae the Food Marketing Institute ("FMI") is a nonprofit association that represents food retailers and wholesalers in the United States and around the world.[1] FMI's 1,500 member compa-

[1] Pursuant to Sup. Ct. R. 37.2(a), amici curiae note that counsel of record for all parties received notice of amici's intention to file this brief at least 10 days prior to the due date of the brief. Pursuant to Sup. Ct. R. 37.6, amici note that no part of this brief was authored by counsel for any party. Amici also note that no party or counsel made a monetary contribu-

nies run the gamut from large chains to independent markets. Together they operate some 26,000 retail food stores in the United States with a combined annual sales volume of $680 billion—three-quarters of all the retail food store sales in the Nation. FMI counts among its primary goals the promotion of food safety through research and education. Towards that end, FMI helps retailers train employees how to safely handle and prepare food and teaches consumers effective food safety measures. FMI also works with both federal and state governments to help notify the industry of product recalls and foodborne illness outbreaks.

Amicus curiae the Grocery Manufacturers Association ("GMA") is the world's largest association of food, beverage, and consumer product companies. With U.S. sales of more than $460 billion, GMA members employ more than 2.5 million workers in all 50 states. GMA leads efforts to increase productivity and growth in the industry and works to help protect the safety and security of the food supply through scientific excellence.

Amicus curiae the International Dairy Foods Association ("IDFA") represents the nation's $90 billion dairy industry. IDFA's 570 member companies include dairy processors and marketers, cheese and ice cream makers, and their suppliers. The organization's 220 dairy processing members represent more than 85 percent of the milk, cultured products,

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tion intended to fund the preparation or submission of this brief, and that no person or entity other than amici or their members made such a monetary contribution. This brief is filed with the consent of all the parties.

cheese, and frozen desserts produced and marketed in the United States.

Amicus curiae the American Frozen Food Institute ("AFFI") is a national trade association that has promoted and represented the interests of all segments of the frozen food industry, including frozen food manufacturers, processors, marketers, and suppliers, for more than 50 years. AFFI's 550 member companies are responsible for manufacturing, processing, transportation, distribution, and sale of approximately 90 percent of the frozen food produced in the United States, with an annual sales volume exceeding $60 billion. AFFI fosters industry development and growth, advocates on behalf of the industry before legislative and regulatory entities, and provides additional value-added services for its members and for the benefit of consumers.

Amici—who together represent the lion's share of this country's food processing and marketing industry—are united in their grave concern about the decision of the California Supreme Court in this case. For 70 years, Congress has entrusted enforcement of the food labeling rules of the Federal Food, Drug, and Cosmetic Act ("FDCA") to federal—and, to a lesser extent, state—government regulators. This system has functioned smoothly, allowing the Food and Drug Administration ("FDA") to exercise the wisdom of the repeat player. FDA knows which high priority regulatory concerns to target for strict enforcement actions, which deserve only warnings or no action at all, and which require a wait-and-see approach due to still developing scientific or empirical evidence. The agency, in short, can and does exercise the discretion bestowed by Congress to allow

the agency and the food industry to focus on important safety issues.

The California Supreme Court's decision throws that sensible regulatory scheme out the window. The court interpreted a 1990 FDCA amendment intended to largely preempt state regulation to fundamentally invert the statute's structure, allowing private citizens to bring suits (and class actions) to enforce FDCA rules after seven decades during which such private enforcement was considered impermissible. According to the court below, Congress enacted this monumental change to U.S. food law without so much as mentioning that it was doing so in the statute itself or in the legislative history.

As petitioners correctly argue, this conclusion is wrong on the law. But it also is devastating in its practical effects: If allowed to stand, the decision below will open the door to costly class action abuses, drive up already spiraling food prices, and undermine, not enhance, the food industry's and FDA's food safety initiatives. This Court should grant certiorari and reverse the California Supreme Court's ruling on this exceptionally important question.

## SUMMARY OF ARGUMENT

The California Supreme Court's erroneous interpretation of the FDCA has real potential to unnecessarily drive up the food industry's legal costs and thus to lighten the wallet of every American. The court's holding permits private citizens to file suit against food companies under "little FDCA" statutes—state food laws with terms identical to those of the federal FDCA. Since most, if not all, states have

enacted little FDCAs, and most, if not all, states have unfair competition laws that would authorize private suits based on violation of the little FDCAs, the rule articulated below will permit unfettered private enforcement of a number of FDCA requirements in every jurisdiction that adopts the California Supreme Court's view.

This change in the long-established status quo would be disastrous. Decades of experience with the class action plaintiffs' bar make it easy to predict that if such FDCA-based causes of action are recognized, lawsuits—and particularly class actions—will multiply. Because the FDCA is a strict liability statute, and because it and its associated regulations contain literally thousands of sometimes complex requirements, food companies could face the risk of huge class action damage claims for minor FDCA violations that, under FDA's current enforcement regime, would lead to nothing more than a warning letter and a quick correction. That increase in litigation, in turn, will drain millions of dollars from these companies' coffers, limiting the resources they have to devote to food safety initiatives and driving up food prices that already stand at record highs.

Such an outcome would not improve food safety, would not help consumers, and indeed would do no one any good, with the possible exception of the class action bar. That, no doubt, is why Congress expressly rejected private enforcement of the FDCA when it crafted the statute. The court below was wrong to obliterate Congress's wise choice on the basis of a statutory amendment that did not so much as hint at a congressional desire to change course.

## REASONS FOR GRANTING THE WRIT

### I. THE HOLDING BELOW WOULD AUTHORIZE A BROAD RANGE OF FDCA-BASED PRIVATE ACTIONS IN MOST IF NOT ALL STATES.

The FDCA, as amended by the Nutrition Labeling and Education Act of 1990 ("NLEA"), vests enforcement power in the hands of federal and, to a lesser extent, state authorities. *See* 21 U.S.C. §§ 336, 337. As part of its narrow grant of enforcement authority to state regulators, the statute permits states to "establish" or "continue in effect" certain requirements regarding food standards and labeling, but only if the state requirements are "identical" to the requirements of the FDCA itself; any non-identical requirements are forbidden. *Id.* § 343-1(a)(1), (3). Section 343-1 is, on its face, a preemption provision intended to eliminate non-conforming state regulation and hence promote national uniformity. *See* House Debate on H.R. No. 3562, 101st Cong., 2d Sess., 136 Cong. Rec. 5840 (daily ed. July 30, 1990) (remarks of Rep. Waxman). The California Supreme Court, however, read the provision to have a much more dramatic effect than the plain language suggests. It held that, notwithstanding Congress's expressed intent to eschew a private right to enforce the FDCA, Section 343-1 "permits private claims" based on *identical* state laws. Pet. App. 24.

To be sure, this holding comes in a case involving only the FDCA's artificial coloring rules and their California analogues, but the court's logic is not so limited. It is potentially national in scope, and it would permit private actions based not just on the artificial coloring rules but on violations of various

other FDCA regulations as well. That is so for two reasons. First, all or nearly all states have followed California and adopted "little FDCAs" effectively incorporating the FDCA's provisions into state law. And second, Section 343-1—the provision the court below interpreted as permitting private actions based on "identical" state laws—authorizes such state analogues across a significant range of FDCA rules.

### A. Most Or All States Have Adopted "Little FDCAs."

California is far from the only state that has adopted a "little FDCA" effectively incorporating the FDCA's rules into state law. On the contrary, it appears that all, or almost all, states have done the same. Amici surveyed 15 state codes for purposes of this brief and found that all 15 have such statutes. Indeed, all 15 have verbatim or near-verbatim versions of 21 U.S.C. § 343(k), the FDCA provision that imposes labeling rules for artificial coloring and that provides the basis for respondents' claims. *See, e.g.*, Alaska Stat. § 17.20.040(a)(11) ("Food is misbranded if * * * it bears or contains artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact"); Ariz. Rev. Stat. § 36-906 (same); Ark. Code Ann. § 20-56-209 (same).[2] As petitioners rightly observe, these state law analogues all can be characterized as consumer protec-

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[2] *See also* Ala. Code 1975 § 2-17-1; Colo. Rev. Stat. § 25-5-411; Conn. Gen. Stat. § 21a-102; Del. Code Ann. Tit. 3, § 8705; Fla. Stat. § 500.11; Ga. Code Ann. § 26-2-28; Haw. Rev. Stat. § 328-10; Idaho Code Ann. § 37-123; 410 Ill. Comp. Stat. 620/11; Ind. Code § 16-42-2-3; Iowa Code § 189A.2; Kan. Stat. Ann. § 65-665.

tion statutes, and violation of a consumer protection statute "automatically constitutes a violation of the unfair competition laws of numerous states." Pet. 23 & n.5. The California Supreme Court's decision thus has the potential to spur the filing of FDCA-based private actions and class actions in every state (or almost every state) in the Nation.

### B. The California Supreme Court's Logic Implicates Not Just Labeling But Food Regulations of Various Kinds.

The decision below also has implications beyond the FDCA's artificial coloring rules. Section 343-1, the provision on which the California Supreme Court based its holding, authorizes "identical" state laws not just in the area at issue in this case but also with regard to "standard[s] of identity," 21 U.S.C. § 343-1(a)(1), nutrition labeling, *id.* § 343-1(a)(4), and more. Those categories, in turn, are quite broad. A standard of identity, for example, is a regulation establishing the criteria which must be met before a food may be labeled in a certain way. FDA promulgates countless standards of identity for many different foods, and the logic of the court below suggests that all of those regulations may be enforced *via* private rights of action—at least so long as the states have incorporated FDA regulations as their own.

Many states have done just that. Most, for instance, have codified versions of FDA's regulations as well as the Model Food Code, which runs hundreds of pages and incorporates numerous FDA regulations on top of those explicitly listed in the code. *See* FDA, *Real Progress in Food Code Adoptions* at 1 (Nov. 2007) (reporting that 48 of the 50 states have

adopted some version of the code);[3] FDA, *et al.*, *The Food Code* at 74 (U.S.P.H.S. 2001) (mandating that "Packaged Food shall comply with standard of identity requirements in 21 CFR 131-169 and 9 CFR 319 * * * and the general requirements in 21 CFR 130 * * * and 9 CFR 319 Subpart A").[4]

Taken together, the near-universal adoption of "little FDCA" statutes, the scope of Section 343-1, and the states' codification of FDA regulations create a legal landscape in which the erroneous decision below may well have a profound effect. In any jurisdiction that follows the California Supreme Court, private plaintiffs arguably would have a cause of action every time a food company commits even a minor violation of one of the many food labeling rules or standards of identity within the ambit of Section 343-1. As amici explain below, such a result would bode ill for both the food industry and American consumers.

## II. PRIVATE ENFORCEMENT WOULD IMPOSE ENORMOUS COSTS ON FOOD COMPANIES (AND THUS ON CONSUMERS) WITHOUT ANY CONCOMITANT FOOD SAFETY BENEFIT.

The newly-minted private right of action created by the California Supreme Court would have drastic consequences for the food industry. If experience is any guide, it would not take long for the class action bar to seize on this new opportunity and launch a barrage of lawsuits. Those lawsuits, in turn, likely

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[3] *Available at* http://www.cfsan.fda.gov/~ear/fcadopt.html.

[4] *Available at* http://www.cfsan.fda.gov/~acrobat/fc01.pdf.

would trigger settlement payouts and litigation costs that would hurt the food industry's bottom line, boosting food prices and diverting resources the industry could have used to fund food safety initiatives. And the negative effects would not be limited to the financial sphere. Private lawsuits would target behavior that FDA, with its perspective as an experienced regulator, may have chosen to regard as harmless or even beneficial. And the mere *threat* of lawsuits would make it more difficult for FDA to obtain voluntary industry cooperation when it investigates potential violations.

The real tragedy is that these deleterious effects would not be offset by improvements in food safety. Just the opposite, in fact. FDA has shown that it is quite capable of vigorously enforcing the FDCA. If recognition of private rights of action would have any impact at all, it would be to hinder FDA's enforcement strategy by presenting issues prematurely or in ways that do not reflect the agency's public health priorities. For all of these reasons, the California Supreme Court's holding was not just legally erroneous but also highly unwise.

### A. Recognition Of Private Enforcement Rights Inevitably Will Spur The Filing of Class Actions.

There can be little doubt that recognition of private rights of action under the FDCA's state law carbon-copies would lead in short order to an explosion in class action litigation directed at the food industry. *See* Claudia L. Andre, *What's in that Guacamole? How* Bates *and the Power of Preemption Will Affect Litigation Against the Food Industry*, 15 Geo. Mason L. Rev. 227, 248 (Fall 2007) (observing in the context

of tobacco that "[o]nce consumers realized state laws might allow for private causes of action, * * * litigation mushroomed"). That litigation boom, in turn, would mean a drain on food manufacturers' and retailers' coffers, even in cases where the targeted companies did nothing wrong. After all, "[a] * * * common abuse in state court class actions is the use of the class device as 'judicial blackmail' in cases that border on frivolous." S. Rep. No. 109-14, at 20-21 (2005). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (citing legislative findings to the effect that "nuisance filings, targeting of deep-pocket defendants, [and] vexatious discovery requests * * * had become rampant" in the securities class-action context) (quotation omitted).

For amici's smaller member companies in particular, "certification of a class action, even one lacking merit," may "force[ ] these defendants to stake their companies on the outcome of a single jury trial[.] * * * [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, J.). And, of course, companies put in this position would be "at risk not just for potential liability but also for legal expenses. Even if the class certifications are later reversed, the defense costs and litigation fees for major class actions can run into the millions of dollars." Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367, 369 (Mar. 2008).

It is worth noting, too, that these class actions almost by definition would be brought in state court.

Unfortunately, that raises the stakes all the more because, as Congress has acknowledged, state court class action mechanisms tend to offer inferior procedural protections: "[O]ne reason for the dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions." S. Rep. No. 109-14, at 14. "In contrast, federal courts generally scrutinize proposed settlements much more carefully and pay closer attention to the procedural requirements for certifying a matter for class treatment." *Id.*

### B. Increased Litigation Costs Would Divert Funds From Food Safety Programs And Could Raise Food Prices.

Ironically, an increase in food safety-related class action lawsuits also may undermine food company efforts to continually enhance food safety. Every company has finite resources, and a dollar devoted to litigation defense is a dollar that cannot be devoted to enhancing food safety.

Just as important, substantially higher food industry litigation costs are sure to translate down the line into higher food prices. That is not something amici ever desire, but it would be especially unfortunate in the current economic environment, when more and more Americans are having trouble paying for basic necessities. The Nation is currently undergoing its worst grocery inflation since the early 1990s, driven in part by higher costs for commodities like corn and wheat and in part by higher oil prices. *See* Andrew Martin & Michael M. Grynbaum, *Costs Surge for*

*Stocking the Pantry*, N.Y. Times, Mar. 15, 2008.[5] With grocery costs up more than five percent in the past year and staples like milk and cheese up more than 15 percent, *see id.*, nearly two in ten American families now report that they are having trouble paying for food. Kaiser Family Found., *Economic Problems Facing Families* at 1 (Apr. 2008).[6] Litigation and settlement expenses that line the pockets of class action attorneys certainly would not help the situation. The only winner would be the plaintiffs' bar.

### C. Private Actions Would Undermine FDA's Well-Calibrated Enforcement Approach.

Recognizing a private right of action under the state law FDCA analogues would have yet another negative side effect: the impediment of effective food safety enforcement.

A key FDCA component is the discretion it grants FDA to *decline* to take enforcement action where a warning, or some other lesser sanction, would be more appropriate. 21 U.S.C. § 336. This discretion is important because the FDCA is a strict liability statute, *see United States* v. *Dotterweich*, 320 U.S. 277 (1943), and there are clearly some technical or first-time violations of the FDCA's many rules that are not deserving of sanctions, much less criminal penalties. FDA has long embraced this principle, issuing warning letters in cases where, for example,

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[5] *Available at* http://www.nytimes.com/2008/03/15/business/15consumer.html?_r=1&ref=business&oref=slogin.

[6] *Available at* http://www.kff.org/kaiserpolls/upload/ 7773.pdf.

a drugmaker failed to list a drug's risks in an online advertisement due to a technical error on a website,[7] or where distributors of cherries were making health claims the agency thought too aggressive.[8] In this way FDA can focus on what it deems to be major violations—those that are so important that they deserve immediate sanctions—while nudging companies to come up to speed on less crucial issues.

Private actions would undermine this FDA approach by making *every* technical FDCA violation within the ambit of Section 343-1, no matter how minor in the grand scheme, a potential source of liability. Not only would that distract FDA and the industry from addressing the agency's priority issues, but it also could ensnarl FDA in matters it would much prefer to bypass. It is likely, for example, that the agency would become enmeshed in factual disputes triggered by litigation, that it would be made a party to demands for confidential information, and that it would be called upon to resolve questions regarding the meaning of the FDCA and its own regulations. FDA thus would lose control over its own limited enforcement resources.[9]

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[7] *See* Reuters, *FDA objects to online ad for Pfizer's Viagra*, Apr. 21, 2008, *available at* http://www.reuters.com/article/PBLSHG/idUSN2143852320080421.

[8] *See* Matt Milkovich, *FDA: Companies Must Stop Promoting Health Benefits of Cherries on Labels*, The Fruit Growers News, Oct. 2005, *available at* http://www.fruitgrowersnews.com/pages/ arts.php?ns=215.

[9] *See* Gardiner Harris, *F.D.A. Chief Writes Congress for More Money*, N.Y. Times, May 14, 2008 (reporting that FDA's commissioner "has written Congress that the agency needs an immediate infusion of $275 million to ensure that imported

Likewise, private actions could limit FDA's ability to respond appropriately to scientific advances. Under the current regime, FDA can adopt interim approaches to changing technologies and can develop its regulatory framework over time. Private actions could truncate that evolutionary process and force the agency to make decisions before the scientific record is complete.

Private actions also could hinder FDA's own investigative processes by making it more difficult for the food industry to cooperate. Presumably, the discovery process in private lawsuits would grant plaintiffs access to records otherwise maintained as confidential by the government. A company would have good reason to fear full voluntary cooperation with FDA if it knew it were creating a record that class action counsel could seize upon to sue the company in search of a big payout.

### D. Private Enforcement Is Not Needed To Protect Consumers.

Finally, it is important to note that FDCA private actions are not necessary for consumer protection. As even a quick glance at FDA's published weekly reports makes clear, FDA vigorously enforces the statute's provisions through warning letters, recall demands, and more aggressive sanctions where appropriate. *See, e.g.*, FDA Enforcement Report (Apr. 30, 2008) (listing numerous pages of recalls, field corrections, and other agency actions for a

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foods, drugs and medical devices are safe"), *available at* http://www.nytimes.com/2008/05/14/washington/14fda.html.

single seven-day period).[10] And of course, a consumer who is actually injured by a food product does not need a statutorily-based private right of action to obtain relief. Remedies for such injuries already exist under well-established tort law.

* * *

Private rights of action, in the final analysis, would weaken FDA while imposing heavy costs on food companies and, by extension, consumers. No doubt that is why Congress chose, when it enacted the FDCA, to limit FDCA enforcement power to government agents, *see Pacific Trading Co.* v. *Wilson & Co.*, 547 F.2d 367, 370 (7th Cir. 1976), to explicitly reject a private right of action, *see National Women's Health Network, Inc.* v. *A.H. Robins Co.*, 545 F. Supp. 1177, 1179-80 (D. Mass. 1982), and to bestow upon FDA the discretion to decide when an FDCA violation is worthy of sanctions, *see* 21 U.S.C. § 336. Amici agree with petitioners that it is implausible to conclude, as the California Supreme Court did, that Congress abandoned all three of those time-tested choices (1) without ever so much as suggesting that it planned to do so, and (2) by means of an amendment that did not purport to do so on its face. The Court should grant review to correct this error on an important question of federal law.

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[10] *Available at* http://www.fda.gov/bbs/topics/ENFORCE/2008/ENF01054.html.

## CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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